

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 EDC 13423

FINAL DECISION

APPEARANCES

ISSUE PRESENTED AT HEARING

PROTECTIVE ORDER

1636977 v1

EXHIBITS

Petitioners' Exhibits admitted into evidence: Nos. 3A, 3B, 5, 15A, 15B, 20, 24, 25, 26, 35, 36, 40, 44, 52, 55, 56, 61, 65, 66, 72, 73, 79, 80, 81, 82, 83, 96, 111, 118, 120, 120A, 121, 122, 125, 137, 138, 141, 143, 146, 147, 148, 164, 165, 175, 177, 178, 187 (under seal).

Respondent's Exhibit's admitted into evidence: Nos. 2, 3, 5, 9, 10, 11, 12, 13, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as a fact that:

FINDINGS OF FACT

1. Petitioners [Mother] and [Father] are residents of Randolph County, North Carolina, and are the parents of the minor Petitioner (hereinafter "[Student]"). (T. Vol. V, p. 510)
2. [Student]'s date of birth is [Month] [day], 2004 and, at the time of the contested hearing, she was 7 years old. (Resp. Ex. 46)
3. For the 2010-11 school year, [Student] attended [ABC] Elementary School in the Randolph County School District in the first grade. (Resp. Ex. 33)
4. A 504 Plan was developed for [Student] to address concerns related to ADHD, OCD, and ODD. School Counselor, [D.F.], served as the 504 Coordinator for [ABC] Elementary School. (T. Vol. II, pp. 458)
5. The 504 Plan provided accommodations such as testing in a separate room, extended test time, modified seating, a behavior plan, and daily communication with the parent. (Resp. Ex. 3)
6. [P.S.] was the School Nurse at [ABC] Elementary School for the 2010-11 school year. Stewart testified that [Student] had a health plan that was created to go along with her 504 Plan. The health plan addressed [Student]'s asthma and included an emergency plan for medical care. [Student]'s medications for behavior were not listed on this plan. (T. Vol. IV,

pp. 100 - 103 ; Pet. Ex. 72 p. 10)

7. [SISTER] is [Mother] 's 13-year-old sister. [SISTER] testified that sometimes in the morning, [Student] will have a meltdown because of her clothes and will be late. Also, she will just refuse to get up. Sometimes [Student] also refuses to take her medications, and her mother tries to make her but she is not strong enough to hold [Student] down and force her to take them. (T. Vol. II, pp. 518-519)
8. [SISTER] testified that [Student] tries to put homework off until the last minute and not do it. [Student] also tries to say that she did not have any homework. When [Student] does try to do her homework, such as reading, she will not be able to read and she will go by what the pictures are in the book. (T. Vol. II, p. 519)
9. [GRANDMOTHER] is [Student]'s grandmother and has worked with [Student] on homework. Sometimes [Student] would get frustrated with math problems. Also, she could read hard words easier than the easy words. (T. Vol. V, pp. 487-489)
10. [Mother] had a lot of concerns with the transition of moving [Student] from her kindergarten year to this new school year. (T. Vol. V, pp. 510-511)
11. Once [Student] made this transition to [ABC] Elementary, [Mother] felt her 504 Plan was not followed. [Mother] testified that she sent a letter to the teachers in Randolph County Schools addressing these concerns. (T. Vol. V, pp. 511-512)
12. [Mother] testified that she obtained evaluations from Moses Cone and High Point Regional Medical Center because she felt like she wanted to be an adequate parent and get professional opinions from two places that are not affiliated with each other and get to the root of the problem for [Student] (T. Vol. V, pp. 513-514)
13. [Mother] 's biggest concern for [Student] is the school improperly handling absences and using [Student]'s chronic medical conditions against her, not showing them as legitimate absences, and connecting the absences with the regression that is seen on the report cards and the interim reports. [Mother] was also concerned that there were several attempts by the school to determine if certain medical reports were legitimate. (T. Vol. V, p. 513- 517)
14. [Mother] testified that she is concerned about "phonics, the phonological sound blending, connecting these words, being able to spell, so she can write and she can write stories freely and flowing without having to concentrate on the fundamentals of each letter for each word." [Mother] is also concerned about that [Student] can fluently read and recall a story without pictures. (T. Vol. V, pp. 522-523)
15. [Dr. W.M.], MD is a pediatric otolaryngologist and has been treating [Student] since she was four years old. He obtained his education from Davidson College for undergraduate school; UNC-Chapel Hill for medical school, University of Pittsburgh for a residency, and Boston Children's Hospital for a fellowship. (T. Vol. IV, pp. 34-36)

16. [Dr. W.M.] testified that as of January 2009, [Student] had “undergone an extensive workup through three allergy evaluations, two endoscopic sinus surgeries, and multiple rounds of antibiotics. She had underlying reactive airway disease and persistent sinusitis. Despite this, an immune workup was within normal limits. She was identified as having a transient immune deficiency with IgG I and III deficiency, which may be more developmental.” (T. Vol. IV, pp. 42, Resp. Ex. 1)
17. [Dr. W.M.] testified that when he has seen [Student] when she is sick, she has severe sinus pain, pressure, coughing, congestion, and headaches. She also has drainage and reactions to the drainage from sore throats to flaring up of her asthma and reactive airway disease. (T. Vol. IV, p. 44)
18. [Dr. W.M.] testified that [Student] does not behave as a typical child does with illness because she does not recover as quickly and seems to have more frequent infections. [Dr. W.M.] testified that “a lot of things have been investigated including cystic fibrosis, immotile cilia dysfunction immune dysfunction” and what the doctors know is that [Student] has had some immune dysfunction identified. “Some of that has been felt to be developmental, meaning she may outgrow it; some of that has shown to be persistent. ... [The immune dysfunction may not be] full blown granulomatous disease, but that has been put out on the table as well.” [Dr. W.M.] thinks [Student] also has eosinophilic esophagitis which is an inflammatory condition that also predisposes the patient to asthma and frequent sinus infections. (T. Vol. IV, pp. 49-50)
19. As of November 18, 2010, Dr. Buckley and the doctors at Duke conducted various testing and ruled out chronic granulomatous disease. [Dr. W.M.] thinks that for [Student] the IgG is still somewhat low, but that there seems to be improvement previous tests. (T. Vol. IV, pp. 87-88)
20. [Dr. W.M.] has consulted with [Student]’s pediatrician, Dr. Jedlica. They have discussed possible homebound services for [Student] The thought was to try to keep [Student] healthy, and one of the options was to take her out of the school setting to allow her home bound teaching either for a short or prolonged period of time depending on her response. (T. Vol. IV, pp. 54-55)
21. [Student] has become somewhat more healthy over the last year, but she still gets sick more than most kids. Also, she frequently requires multiple antibiotics to clear an infection. Regarding medications, [Student] has been on both oral and inhaled and nasal steroids. All of those can make you irritable, more active and less focused. Antibiotics can cause diarrhea and an upset stomach. Sometimes antihistamines can cause irritability and behavioral issues, which can exacerbate some of the underlying developmental and behavioral problems. (T. Vol. IV, p. 60, 74-75)
22. [Dr. W.M.] has not made any direct observations of [Student] at school or in any educational environment. [Dr. W.M.] has not had any involvement with the exceptional children’s eligibility process in the Randolph County Schools for [Student] (T. Vol. IV, p. 80, 82-83)

23. [Dr. W.M.] testified that, in his conversations with Dr. Jedlica about homebound services, they did not develop any recommendations regarding whether [Student] was eligible for special education under federal special education law. He testified that this was out of his field of expertise. He is just supporting medically that it would be beneficial to her health not to be not around a lot of sick people. (T. Vol. IV, p. 90)
24. In the 2010-11 school year, [Mother] requested that the school consider whether [Student] was eligible for special education services. (Resp. Ex. 17)
25. [M.F.] is a licensed school psychologist and also holds a national certification in school psychology. [M.F.] holds a B.S. degree in Human Development from Cornell University and an M.Ed. in School Psychology from UNC-Chapel Hill. (T. Vol. I, pp. 32-33)
26. As a part of the pre-referral process, [M.F.] conducted a classroom observation on October 11, 2010. [M.F.] observed [Student] in a regular first grade class for a whole group math lesson. [M.F.] observed that [Student] was eager to participate; raised her hand frequently; and kept up with the other students. [Student] was a little fidgety, but was easily brought back to task. (T. Vol. I, pp. 34-35; Resp. Ex. 11)
27. An additional pre-referral observation was done by a first grade teacher, [A.L.]. According to the observation report, [A.L.] observed [Student] during a small group reading activity. [Student] was able to participate well in the activity although she had some fidgety behaviors and showed some defiance to teacher directions. (T. Vol. I, pp. 36-37; Resp. Ex. 10)
28. As a part of her evaluation, [M.F.] reviewed background information including parent concerns, data from interventions, medical information, and a Social Developmental History provided by the parent. [M.F.] also talked with the teacher about how [Student] was doing in the classroom. (T. Vol. I, p. 38, Resp. Ex. 9)
29. [M.F.] administered the Stanford-Binet Intelligence Scales and [Student] obtained a full-scale IQ score of 98 which is in the average range. The nonverbal and verbal ability levels were also average. [M.F.] also administered the Woodcock-Johnson Tests of Achievement, 3rd Edition. Most scores on the Woodcock-Johnson were in the average range with some scores falling in the high average range. [Student] received a low average score on one subtest, math fluency, which is a timed subtest of addition and subtraction problems. (T. Vol. I, pp. 38- 42; Resp. Ex. 18)
30. [M.F.] obtained behavior ratings from the parent and teacher using the Conners' Rating Scales, Third Edition. The primary use of the Conners' is assessment of ADHD, but it also includes measures of conduct disorder, oppositional defiant disorder, and other behavioral issues. Results for [Student] indicated that both the parent and teacher had significant concerns regarding her behavior. [Student] had multiple scores that were considered clinically significant with the problems being slightly more severe at home than at school. (T. Vol. I, p. 43; Resp. Ex. 18)

31. The IEP team met on December 14, 2010, to review the evaluation results for [Student]. At this meeting, [M.F.] reviewed her report and how [Student] performed on the testing. (T. Vol. I, pp. 46-; Resp. Ex. 22)
32. At the December 14, 2010 IEP meeting, the team specifically considered eligibility in the areas of Other Health Impaired (“OHI”) and Learning Disabled (“LD”). A Summary of Evaluation/Eligibility Worksheet was completed for OHI and a Worksheet was completed for LD. As reflected on the Worksheets, the IEP team considered hearing and vision screening results; intervention results; parent conference information; classroom observations, the social developmental history; test results; and medical information. (T. Vol. I, pp. 48-50; Resp. Ex. 23, 24)
33. The medical information reviewed by the IEP team included a Physician Report for ADD/ADHD completed by Dr. Michelle Jedlica, [Student]’s pediatrician. The report indicated that [Student] had a diagnosis of ADHD and a number of other medical conditions. The report also indicated that [Student] had recurrent absences due to her illness and doctor visits, and she may have difficulty concentrating and understanding due to the illness and feeling poorly. The team also reviewed a Physician Report for Chronic/Acute Health Problems from Dr. Jedlica. This report indicated that [Student] was taking a number of medications to address her medical issues. Dr. Jedlica noted that [Student]’s multiple and chronic health conditions make her academics a challenge. Dr. Jedlica also noted that [Student]’s poor health may have negatively impacted her learning and requested that the IEP team provide all accommodations as seen fit. (T. Vol. I, pp. 48-52, ; Resp. Ex. 20, 21)
34. For the OHI analysis, the IEP team found that [Student]’s ADHD caused her to demonstrate limited alertness. However, the IEP team also found that, with average cognitive abilities and average to high average academic skills, the test results did not indicate that the ADHD adversely affected [Student]’s academic development. The IEP team also concluded that [Student] did not require specially designed instruction and, therefore, she was not eligible for special education services. For the LD analysis, the IEP team considered the existence of an impairment using a discrepancy model, but found that there was not a discrepancy between [Student]’s ability level and her achievement level. As with the OHI analysis, the team again found no adverse effect on educational performance and no evidence that [Student] required specially designed instruction. (T. Vol. I, pp. 53-58 ; Resp. Ex. 23, 24)
35. After the review of the evaluation results and analysis of eligibility for [Student], the IEP team prepared a final Eligibility Determination document and Prior Written Notice to the parent indicating that [Student] was not eligible for special education and related services. (T. Vol. I, pp. 60-61 ; Resp. Ex. 25, 26)
36. [M.P.] is a Reading Specialist at [ABC] Elementary School and had [Student] in a reading group during the 2010-2011 school year. (T. Vol. III, p. 568)
37. On December 8, 2010, [M.P.] reported that [Student] was reading on a level B at the end

of kindergarten, which is one level below grade level. At the beginning of first grade, “[Student] was reading below Level A. [Student] recognized 52 letters, uppercase and lowercase, fluently. Since August [Student] had progressed to an independent reading level of C. Currently [Student] is being instructed at a Level D and E.” (T. Vol. III. Pp. 572; Petitioner’s Exhibit 73, p. 10) [M.P.] testified that Level E is grade level in January. [M.P.] taught [Student] “four days a week in thirty minute lessons. She read Level C at 96 percent on November 29, 2010. Her beginning date for lessons [with [M.P.] was September 13, 2010. She missed twelve lessons due to absences or tardies.” (T. Vol. III. Pp. 571-573, Petitioner’s Exhibit 73)

38. [M.P.] did not work with [Student] during the 2011-2012 school year. All students are re-evaluated at the beginning of each school year and selected for reading groups based on specific criteria. (T. Vol. III, pp. 582-583)
39. On January 7, 2011, school officials and [Mother] met to review [Student]’s 504 Plan. The team discussed various strategies for assisting [Student] including making eye contact and repeating directions, use of homework packets and use of the behavior system. The team also discussed handling substitute teachers and a contingency plan if [Student] had to go to the hospital. 504 Coordinator [D.F.] testified that the 504 Plan was carried out as written. (T. Vol. II, pp. 462- 464; Pet. Ex. 65)
40. On her First Grade report card, [Student] received “S” (Satisfactory) or “S-” on 16/28 ratings for Behavior/Work Habits. Her reading level improved from “A” (Emergent) to a high “H” (Developing). The expected end of year reading level for First Grade was I. On various skills in Reading, Writing and Math, she was rated as consistently meeting grade level expectations in many areas. There were some areas where she was inconsistent in meeting grade level expectations. There were no areas where she was significantly below grade level. [Student] was promoted to the Second Grade for the 2011-12 school year. (T. Vol. I, pp. 150-158; Resp. Ex. 33)
41. In the summer of 2011, [Mother] obtained a private psychological evaluation for [Student] from Dr. [M.L.]. (Resp. Ex. 34)
42. [M.L.], Ph.D. is a child/adolescent psychologist. He has a bachelor’s degree in psychology from Washington and Lee University, a master’s degree in counseling psychology from Colgate University, and a second master’s degree and Ph.D. in clinical psychology from the California School of Professional Psychology. Dr. [M.L.] is a licensed psychologist in the state of North Carolina and is employed as a psychologist with the Developmental and Psychologic Center, which is a department of Cone Health System. The majority of Dr. [M.L.]’ time in the morning is spent doing evaluations. Dr. [M.L.]’ Monday/Friday office is the Child Custody Center, where he provides court-ordered custody evaluations. The court accepted Dr. [M.L.] as an expert in child and adolescent psychology. (T. Vol. IV, pp. 157-159)
43. Dr. [M.L.]’ May 2011 psychological evaluation, which uses the Wechsler Intelligence Scale for Children, 4th edition, found that [Student] is overall a very bright young lady in

the above-average to superior range in intelligence. [Student] had two areas of weakness that were in the below average range of intelligence: perceptual processing speed and graphomotor processing speed; and short-term active auditory working memory. (T. Vol. IV, pp. 162-163, Resp. Ex. 34)

44. Academically, Dr. [M.L.] gave [Student] the Woodcock-Johnson III Tests of Achievement. “[O]verall in the math realm [[Student]] performed in the average to upper end of average range of functioning and in some cases even in the above-average range of functioning at levels fairly consistent with her smartness. [[Student]’s] math processing speed, which is timed math, was ... quite weak toward the lower end of the below average range of functioning.” [Student]’s reading skills “were measured in the average range of functioning and, in some cases, creeping down toward the low end of the average range.” [Student] made numerous “dyseidetic reading errors, visual errors, confusing ‘b’s’ and ‘d’s’ and had difficulty with sight words.” In the written language portion, [Student] Performed in the above-average range of functioning. (T. Vol. IV, pp. 163-164)
45. Dr. [M.L.] concluded that [Student]’s “overall auditory memory ... was quite good, in the above-average range of functioning.” [Mother]’s visual memory was in the average range of functioning. “The diagnostic conclusions were superior intelligence based on the Global Ability Index, which it was [Dr. [M.L.]’s clinical opinion was the best estimate of [Mother]’s] intellectual ability. ... [Dr. [M.L.] carried over [Student]’s diagnosis of ADHD [and made] a diagnosis of mild dyseidetic reading disorder.” Dr. [M.L.]’ recommendation for [Student] was to work on reading, whether that be tutoring or in the classroom instruction, a systematic reading program. Dr. [M.L.] testified that these recommendations can be done in the classroom, by a tutor, and some of them are things for [Student] to do at home. (T. Vol. IV, pp. 165-168, 215)
46. Dr. [M.L.] testified that he does not have any knowledge of [Student]’s reading program at school or how they are teaching reading to [Student] Dr. [M.L.] has not had any contact with Randolph County School officials about [Student] nor observed her in the classroom. (T. Vol. IV, pp. 177 and 202)
47. Dr. [M.L.] testified that he expected school officials to review his report and meeting as a team that would include a school psychologist, an administrator, and the classroom teacher, and the data and make recommendations about what they felt was in [Student]’s best interest. (T. Vol. IV, p. 202)
48. Dr. [M.L.] testified that [Student] has a very small base of sight words based on watching her read. Dr. [M.L.] testified that is certainly possible that a classroom teacher who observes [Student] reading on a very regular basis over the course of a school year might come up with different information regarding her sight word skills, as in she might actually have an average or much better base of sight words.
49. The evaluator found that [Student] had superior intelligence based on a General Ability Index rather than her full scale IQ. He concluded that [Student] had, among other things, a mild dyseidetic reading disorder. (Resp. Ex. 34)

50. [M.C.] is an LD Resource Teacher at [ABC] Elementary School. [M.C.] helps in gathering information for the IEP team to review in making eligibility determinations. On August 24, 2011, [M.C.] sent [Mother] an Invitation to Conference for a meeting to discuss the Lewis evaluation. The IEP team met on August 29, 2011 and [M.C.] assisted the team in completing the Special Education Referral for [Student], including discussing and documenting additional information from [Mother] about the referral. At this meeting, the IEP team decided to complete interventions and classroom observations and then reconvene to make a decision on eligibility. (T. Vol. I, p. 88, 125-128 ; Resp. Ex. 37, 39, 40)
51. [J.C.] is a second grade teacher at [ABC] Elementary School and was [Student]'s teacher for the 2011-12 school year. [J.C.] holds a bachelor's degree in Elementary Education from the University of Calgary and a master's degree in reading from North Carolina A&T University. [J.C.] is licensed to teach elementary education and reading. (T. Vol. I, pp. 169-171)
52. On August 31, 2011, the Assistance Team met to develop interventions for [Student]. As a part of that process, [J.C.], the Regular Classroom Teacher completed a Focus of Concern/Screening Form. The purpose of this form is to gather information such as parent conferences, observations, school history and then to record information about the interventions implemented for the student. The Assistance Team identified three interventions for [Student] based on the weaknesses identified in Dr. [M.L.]' evaluation. (T. Vol. I, p. 88, 129-131, 189, 193; Resp. Ex. 46)
53. In [J.C.]'s second grade class, [Student] was an active participant in activities. She worked independently and in groups. [Student] had some attention issues and had to be redirected sometimes. Academically, [Student] demonstrated weaknesses in writing and spelling. Her reading was on grade level when the class read in small groups. [Student] had inconsistencies in Math where she was good with calculation and shapes but had difficulty with problem solving. (T. Vol. I, pp. 172-174)
54. [J.C.] used various strategies to assist [Student] in the classroom including redirection and seating near the front of the class or near a peer who could offer assistance. [J.C.] also implemented [Student]'s 504 Plan including providing oral directions, extra test time, testing in a separate room, and a behavior plan. [J.C.] testified that the 504 Plan was working well in her classroom. (T. Vol. I, pp. 176- 178; Resp. Ex. 3)
55. [Student] attended school in [J.C.]'s class until October 21, 2011. During that time, [Student] was in attendance for 16 days and absent 4 days. [J.C.] completed a Report Card for [Student] for the first quarter of the school year based on the available information. [J.C.] rated [Student] as "Satisfactory" on six out of seven Behavior/Work Habits. [Student] was rated as "Needs Improvement" in working independently. [J.C.] testified that [Student] "showed very good self-control and followed directions for the most part." In Reading, [Student] was on Level "I" which is the entry level for second grade. [Student] could retell and answer questions about a text and she read grade-level text with fluency and expression. In a guided reading session, [Student] was usually able to comprehend what she read, but on

her own, her comprehension was inconsistent. [Student] was good at writing sentences, but had difficulty with supporting details, punctuation and capitalization and spelling. In Math, [Student] could read and write numbers to 400, but had difficulty with comparing and order, renaming, and estimating. [Student] was very fluent with addition and subtraction but was inconsistent with problem solving. [Student] was on grade level for the math skills related to shapes. Overall, the ratings on [Student]'s report reflect typical problems for second graders. (T. Vol. I, pp. 180-186; Resp. Ex. 45)

56. [Mother] had concerns about [Student]'s performance in the second grade. [Mother] reported to [J.C.] that [Student] struggled at home with her weekly homework. (T. Vol. I, p. 209)
57. [D.G.] is a school nurse for the Randolph County Schools and was at [ABC] Elementary School for the first two months of the 2011-2012 school year. [D.G.] provided [Mother] with a copy of the school district's policy on Administering Medicines to Students and talked with [Mother] about [Student]'s medications. [D.G.] had concerns about some of [Student]'s medications should be given at home and only the medications that needed to be given at school should have been at school. [D.G.] also had a concern that there were some medications for which the school did not have a signed form from [Student]'s physician. [Mother] agreed to get the required forms but she did not. (T. Vol II, pp. 485 - 493; Pet. Ex. 139)
58. Principal [S.S.] conducted an observation of [Student] in the classroom on October 7, 2011. [S.S.] observed that [Student] followed teacher directions to copy shapes and complete a worksheet for a math activity. [Student] had to be redirected several times from playing with an eraser during a group activity sitting on the carpet. [S.S.] also observed [Student] around school and found her to be very typical of other second-graders at the school. (T. Vol. I, p. 89-91 ; Resp. Ex. 43)
59. The classroom teacher, [J.C.] implemented the intervention strategies developed by the Assistance Team for [Student] The Math Fluency intervention involved giving [Student] timed math facts every day. For the Reading Fluency intervention, [J.C.] worked with [Student] one-on-one reading passages together and then having [Student] read them on her own. For the Spelling intervention, [J.C.] had [Student] copy her weekly spelling words; cover them and take a spelling test; and then review any mistakes she made. [J.C.] testified that [Student] showed improved with each of these interventions. (T. Vol. I, pp. 193-196; Resp. Ex. 46)
60. On October 19, 2011, school officials held a meeting to discuss some of [Student]'s medical conditions and to make sure her medications were being properly administered. Several of the school nurses attended the meeting as well as the school social worker. [Mother] was concerned that some people were present that she did not know would be attending the meeting. (T. Vol. I, p. 112-113; T. Vol. V, p. 519-520)
61. [B.M.] is a School Nurse for Randolph County Schools. [B.M.] attended the meeting to discuss [Student]'s medications. [Mother] became upset during the meeting, said that she

would take [Student]'s medication and that she would take [Student] out of school. (T. Vol. IV, pp. 124, 129, 136)

62. On October 21, 2011, [Mother] came to [J.C.]'s classroom during the time the students were cleaning their desks. [J.C.] did not know why [Mother] had come to school at that time. The previous day, [J.C.] had been told that [Student] might be leaving the school. When [Mother] came into the classroom, [J.C.] said hello, but [Student] did not respond. [Student] asked her mother why she was there and [Mother] did not respond to her. They walked to [Student]'s desk and [Mother] said, "[Student] get your stuff," so [J.C.] proceeded to pull out [Student]'s belongings. (T. Vol. I, pp. 241-243)
63. [Student] has not returned to school since October 21, 2011 and is being homeschooled. (T. Vol. V, p. 523)
64. [M.K.] works for Cone Health as an occupational therapist and she is the pediatric team supervisor. [M.K.] worked directly with [Student] In [M.K.]'s Renewal Summary she said that [Student] has difficulty with motor planning, so performing a jumping jack is difficult, sequencing movements and sequencing handwriting are difficult. [M.K.] testified that [Student] would become frustrated and she required a lot of encouragement to continue the task, requiring her to break the task down step by step. (T. Vol. III, pp. 617, 622-623, Resp. Ex. 35)
65. [M.K.] testified that she did not participate in the eligibility determination process for special education conducted by the Randolph County Schools for [Student] [M.K.] does not have any knowledge of information reviewed by school officials to make an eligibility determination for special education for [Student] (T. Vol. III, p 627)
66. [M.C.] works for Cone Health in the Pediatric Outpatient Department. [M.C.] testified that she is working with [Student] on fine motor planning related to life skills such as tying shoelaces. [M.C.] has also started working with [Student] on handwriting. [M.C.] said that [Student] tends to use a little too much force especially when she is learning a new skill and control of her movements. She started working with [Student] on brushing her hair and discussed clothing because in the wintertime she tends to wear shorts and goes without socks. (T. Vol. III, pp. 628, 630-631, 636)
67. [M.C.] believes there are different guidelines for occupational therapy in the school setting and if there was an occupational therapist working with a child in a school system, that she would certainly talk with them or defer to them because they work with the child in that setting. (T. Vol. III, pp. 638-639)
68. [M.C.] testified that she did not participate in the eligibility determination for special education services for [Student] in the Randolph County Schools and she is not aware of the information that school officials reviewed in considering her special education eligibility. (T. Vol. III, p. 639)
69. [C.P.] is a pediatric occupational therapist for High Point Regional Health Systems. She

has provided therapy services to [Student] working on sensory processing issues and fine motor issues. [C.P.] was not involved in Respondent's eligibility determination process for [Student] and is not familiar with the standards or requirements for determining special education eligibility in the school district. (T. Vol. V, pp. 330; 336-337)

70. [D.P.] is a Family Nurse Practitioner at The Developmental and Psychological Center. [Student] has been seen at the Center since July 2008. [D.P.] works under the supervision of a neuro-developmental pediatrician, Dr. [S.F.]. In consultation with Dr. [S.F.], [D.P.] diagnosed [Student] with ADHD and anxiety and these are the conditions for which she treated [Student]. [D.P.] was not involved in the eligibility determination process conducted by Respondent for [Student] and has not made any recommendations to Respondent about [Student] (T. Vol. V, pp. 297-298; 311- 313; 325)
71. [J.P.] is a first grade teacher at [ABC] Elementary. She taught [Student] during the 2010-2011 school year. (T. Vol. III, p. 640)
72. [J.P.] testified that a Personal Intervention Plan ("PIP") was filled out for [Student] on September 16, 2010. A PIP sets out areas that the child is weak in and then strategies are set up to work on those areas. [J.P.] said that the PIP is used to identify when a child is slightly below grade level in an area. [Student]'s PIP provided small group instruction, reading remediation, 504 recommendation, math remediation, and Title I reading services. (T. Vol. III, p. 641-643; Resp. Ex. 5)
73. [J.P.] testified that she noted on the PIP that [Student]'s attendance was poor in kindergarten. [Student] was below level in kindergarten and she was absent 49 days. As of December 8th, [J.P.] believes that there had been some question about the number of days that [Student] actually missed so she corrected the PIP to 45 days to reflect the NC WISE absences. (T. Vol. III, p. 645)
74. [J.P.] testified that [Student] was very loving towards her and liked to give hugs. [J.P.] had to stay on her to get her work done and would give her extra time to complete assignments. [J.P.] testified that academically, based on classroom performance and assessments, that [Student] was on grade level. With regards to [Student] socially with her peers and herself, [J.P.] testified that it depended on the day. Sometimes [Student] was fine and most of the time she had good days. Everyone once in a while [Student] would have an off day and might have trouble completing her work. (T. Vol. III, p. 650)
75. The IEP team met on November 16, 2011 to discuss evaluation results and determine eligibility for special education services. Various members of the IEP team discussed evaluation information that had been received since the prior eligibility meeting. (T. Vol. I, p. 94 ; Resp. Ex. 44, 47, 48,)
76. [C.G.] is a school psychologist with the Randolph County Schools. [C.G.] holds a B.S. degree in Management Information Systems and a B.S. in Psychology from Pennsylvania State University. She holds a master's degree in Child Psychology from Duquesne University and has completed all requirements except the dissertation for a Ph.D. in school

psychology. [C.G.] is licensed as a school psychologist. (T. Vol. II, pp. 309-310)

77. [C.G.] was a member of the IEP team which reviewed the Special Education Referral for [Student] in August 2011. As a part of this evaluation process, [C.G.] reviewed [Student]'s school records and background information and conducted one of the two classroom observations of [Student] [C.G.] observed [Student] on October 7, 2011. [C.G.] documented that [Student] was on-task and working quietly at her desk. [Student] asked the teacher if she could take her spelling test in a quiet area away from other students who were talking. [Student] went to the quiet area, took the test along with her peers and received assistance from the teacher when requested. [Student] sat on the carpet along with the class to do their morning work and responded correctly to a question from the teacher. During a group activity, [Student] asked for help when needed and interacted positively with peers in her group. In conducting this observation, [C.G.] considered information from the Lewis Psychological Evaluation and looked for any indications of ADHD, anxiety, or PDD. [C.G.] did not observe any behaviors characteristic of these diagnoses. (T. Vol. II, pp. 311 - 318 ; Resp. Ex. 39, 42)
78. [C.G.] was a member of the Assistance Team which met on August 31, 2011 to develop interventions for [Student] [C.G.] testified that the Assistance Team reviewed the Lewis Psychological Evaluation and the parent's concerns and identified interventions to address the identified weaknesses. [C.G.] testified that the interventions are done to help determine whether a child needs specially designed instruction outside of the regular education classroom. For [Student], the team selected a reading fluency intervention (repeated readings), a math fluency intervention (timed math facts), and a spelling intervention (copy/cover/compare). (T. Vol. II, pp. 320 - 325)
79. [C.G.] testified that [J.C.] completed a document entitled Daily Documentation of Interventions and [C.G.] then analyzed that information to determine if the student was making progress. On the reading fluency intervention [Student] improved from reading at 30 words per minute to reading at 62 words per minute after four weeks. On the math fluency intervention, [Student] improved from 7/9 math problems correct to 18/20 correct. For spelling, [Student] improving from spelling 3/7 words correctly to spelling 7/7 words correctly in one week and repeated a similar pattern for the other weeks of the intervention. (T. Vol. II, pp. 326 - 335; Resp. Ex. 52)
80. [C.G.] also analyzed [Student]'s performance in relation to her peers using the results of the Universal Screening which is done for all Randolph County 2nd graders at the beginning of the school year. [Student] had low average scores in Spelling and Writing but her scores were within a 1.5 standard deviation of the mean. These results indicated that [Student] needed some interventions, but was not so significantly delayed as to demonstrate a disability. From these analyses, [C.G.] concluded that [Student] was responding well to the interventions being implemented in the classroom and that she did not need specially designed instruction. (T. Vol. II, pp. 343 – 350; Resp. Ex. 52)
81. As a part of her involvement in the evaluation process, [C.G.] reviewed school records for [Student] including information received from doctors about [Mother]'s underlying

medical conditions. [C.G.] reviewed information from Dr. Jedlica indicating that [Student] met the criteria for Pervasive Developmental Disorder based upon M-CHAT criteria. [C.G.] testified that she is familiar with the M-CHAT as a screener for social and communication functioning for children birth through 36 months. [C.G.] testified that the M-CHAT was used for [Student] when she was 6 years old and that this was not an appropriate use of this instrument. Further, [C.G.] testified that when she observed [Student] at school, she did not see many of the behaviors that are checked on the M-CHAT. (T. Vol. II, pp. 356 – 361; Resp. Ex. 30, 36)

82. [C.G.] also testified that in her review of school records about the underlying medical conditions, she found discrepancies with the diagnosis of chronic granulomatous disease. One medical report stated that the condition had been ruled out, yet later records from other physicians continued to identify this as one of [Student]’s diagnoses. There also was a private occupational therapy report that referenced a diagnosis of autism for [Student] but no other records indicating that [Student] had actually been diagnosed with autism. (T. Vol. II, pp. 364 – 366)
83. At the November 16, 2011 IEP meeting, [C.G.] presented information about the educational and psychological evaluations that she had reviewed. She also helped the classroom teacher discuss the interventions. She also participated in preparing the Summary of Evaluation/Eligibility Worksheets for OHI and for SLD by completing the sections about the educational evaluations and the research based interventions. [C.G.] participated in the IEP team’s discussion of eligibility and was in agreement with the decision that there was not an adverse effect on educational performance and that [Student] did not require specially designed instruction. (T. Vol. II, pp. 372 - 378 ; Resp. Ex. 47, 48, 49)
84. At the November 16, 2011 IEP meeting, [C.G.] offered to assist in developing additional accommodations or interventions to be included in [Student]’s 504 Plan based upon the information in the Lewis Psychological evaluation. [C.G.] also suggested that the team continue to administer the interventions that were implemented during the evaluation process. [Mother] declined this offer. (T. Vol. II, pp. 418-420)
85. [H.C.] is an Occupational Therapist with the Randolph County Schools. [H.C.] has a B.S. degree in Occupational Therapy and is licensed and registered nationally as an Occupational Therapist. [H.C.] observed [Student] in the classroom during [Student]’s first grade year to provide recommendations to the 504 team about whether [Student] needed occupational therapy. [H.C.] observed [Student] in the classroom, consulted with the classroom teacher and reviewed an outside Occupational Therapy evaluation the parent provided. [H.C.] concluded at that time that [Student] did not need occupational therapy. (T. Vol. I, pp. 246 - 250)
86. [H.C.] also was a member of the IEP team which reviewed the Special Education Referral for [Student] in August 2011. As a part of this evaluation process, [H.C.] reviewed the private Occupational Therapy Evaluations for [Student] from Moses Cone Outpatient Rehabilitation. [H.C.] also observed [Student] in the classroom. [H.C.] observed [Student] participating appropriately in an art lesson and completing other academic work. [H.C.]

reviewed some of [Student]’s work samples and found that her work varied in legibility depending on whether the paper was lined. (T. Vol. I, pp. 251 - 257; Resp. Ex. 39)

87. At the November 16, 2011 IEP meeting, [H.C.] presented information about the private Occupational Therapy Evaluations and described that [Student] scored in the average range on the Visual Motor and Visual Perceptual tests that were given to her. [Mother] had expressed concerns to the private evaluators about sensory issues and issues with dressing at home. (T. Vol. I, pp. 259 - 267; Resp. Ex. 48, 49)
88. [L.N.] is a speech pathologist with the Randolph County Schools who has worked at [ABC] Elementary School for twenty-two years. [L.N.] holds a B.S. in Communication Disorders and an M.A. in Speech/Language Pathology from Western Carolina University. [L.N.] has state licensure and national certification in speech/language pathology. [L.N.] completed an articulation and language screening as well as a hearing screening for [Student] when [Student] was in the 1st grade. [Student] passed both of these screenings. (T. Vol. II, pp. 282-283)
89. [L.N.] was asked to review two private assessments as a part of [Student]’s 2011 evaluation process. [L.N.] reviewed a March 2, 2011 Audiological and Auditory Processing Evaluation conducted at Moses Cone Health System and an April 25, 2011 Speech/Language Evaluation conducted at High Point Regional Health System. With the Moses Cone evaluation, [L.N.] had concerns that [Student] was not able to complete the entire evaluation, yet it had been that she had an auditory processing disorder. [L.N.] also was concerned that [Student] was administered the same test (Test of Auditory Perceptual Skills, “TAPS”) less than two months apart. On one of the TAPS subtests, [Student] obtained a standard score of 100 on one administration and then a standard score of 55. [L.N.] questioned the validity of these results. [L.N.] also found the auditory comprehension standard score of 75 on the High Point Regional evaluation to be inconsistent with the Verbal Comprehension Index of 116 on the Lewis Psychological Evaluation. Similarly, [L.N.] found the Number Memory Forward standard score of 55 on the Moses Cone evaluation to be inconsistent with Verbal Memory standard score of 111 on the Lewis Psychological. Overall, [L.N.] found that [Student]’s performance on these two evaluations was not consistent with a student with a true auditory processing disorder. (T. Vol. II, pp. 284-293; Resp. Ex. 29, 31)
90. At the November 16, 2011 IEP meeting, [L.N.] presented information about the private evaluations that she reviewed. She also participated in preparing the Summary of Evaluation/Eligibility Worksheets for OHI and for SLD by completing the speech/language pathology information that was provided from the outside agencies. [L.N.] participated in the IEP teams discussion of eligibility and was in agreement with the decision that there was not an adverse effect on educational performance and that [Student] did not require specially designed instruction. (T. Vol. II, pp. 295-299; Resp. Ex. 48, 49)
91. At the November 16, 2011 IEP meeting, the team again considered eligibility in the areas of OHI and Learning Disabled LD. A Summary of Evaluation/Eligibility Worksheet was completed for OHI and a Worksheet was completed for LD. As reflected on the Worksheets, the IEP team considered hearing and vision screening results; intervention results; parent

conference information; classroom observations; the social developmental history; test results; and medical information. (T. Vol. I, pp. 142-144; Resp. Ex. 48, 49)

92. The IEP team reviewed a detailed analysis of test scores from the evaluations and a detailed analysis of [Student]'s performance on the intervention strategies which demonstrated that, although [Student] had some underlying medical conditions and on one intelligence test, a discrepancy between her measured ability and achievement, but she continued to perform academically at the appropriate level for someone of her age and grade. (Resp. Ex. 48, 49)
93. The data reviewed also demonstrated that [Student] did not need specially designed instruction.
94. After the review of the evaluation results and analysis of eligibility for [Student], the IEP team prepared a final Eligibility Determination document and Prior Written Notice to the parent indicating that [Student] was not eligible for special education and related services. (T. Vol. I, pp. 147-148; Resp. Ex. 50, 51)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., and implementing regulations, 34 C.F.R. Part 300.
2. Pursuant to N.C. Gen. Stat. §150B-1, the Office of Administrative Hearings does not have subject matter jurisdiction over Petitioners' claim for violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (2006).
3. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Shaffer v. Weast*, 546 U.S. 49, 51 (2005). In this contested case, Petitioners are the parties seeking relief and therefore bear the burden of proof for the remedies sought. Petitioners have the burden of persuasion in this case to show that Respondent has failed to provide [Student] with a free appropriate public education ("FAPE") by failing to identify [Student] as a child with a disability and thereby eligible for special education services. Petitioners carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary defines "preponderance" as "something more than weight; it denotes a superiority of weight, or outweighing."
4. A child with a disability means a child evaluated in accordance with state procedures as having autism, deaf-blindness, deafness, developmental delay, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, serious emotional disability, specific learning disability, speech or language impairment, traumatic brain injury, or visual impairment (including blindness), and who, by reason of the disability, needs special education and related services. (*North Carolina Policies and*

Procedures Governing Services for Children with Disabilities, NC 1500-2.4 (a)(1)).

5. Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette's Syndrome, etc., and adversely affects a child's educational performance. (*North Carolina Policies and Procedures Governing Services for Children with Disabilities* NC 1500-2.4 (b)(10) (i-ii)).
6. To be determined eligible in the disability category of other health impairment, a child must have a chronic or acute health problem resulting limited strength, limited vitality, or limited alertness. The disability must have an adverse effect on educational performance and require specially designed instruction. (*North Carolina Policies and Procedures Governing Services for Children with Disabilities*, NC 1503-2.5 (d)(10) (ii-iii)).
7. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the impaired ability to listen, think, speak, read write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (*North Carolina Policies and Procedures Governing Services for Children with Disabilities*, NC 1500-2.4 (b) (11) (i)).
8. In order to be eligible in the disability category of specific learning disability, a child must have a discrepancy between achievement and measured ability or a child's response to scientific research-based intervention must be analyzed and the team must determine that the child needs resources beyond what can reasonably be provided in general education. The disability must have an adverse effect on educational performance, and require specially designed instruction. (*North Carolina Policies and Procedures Governing Services for Children with Disabilities*, NC 1503-2.5 (11) (iii)).
9. Petitioners have not met their burden of demonstrating that [Student] is eligible for special education under the categories of OHI or SLD inasmuch as the evidence does not demonstrate that [Student]'s underlying conditions have an adverse effect on her educational performance or that she needs specifically designed instruction.
10. At the close of the evidence, Petitioner requested that Petitioners be reimbursed for costs incurred during the course of the hearing. Under the IDEA, the court "may award reasonable attorneys fees as part of the costs the parents of a child with a disability who is prevailing part." 20 U.S.C. § 1415(i)(3)(B) Under the North Carolina Policies governing Services for Children with Disabilities, "In any action or proceeding brought under section 615 of the IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to – (1) [t]he prevailing party who is the parent of a child with a disability." *North Carolina Policies and Procedures Governing Services for Children with Disabilities*, NC 1500-1.18.

11. Petitioners are not the prevailing party in the within proceeding and, therefore, reimbursement for costs incurred during the course of the hearing is not applicable.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, it is the Court's decision that the Petitioners have not met the burden of proof required by the Individuals with Disabilities Education Act in the issue before the Court. Therefore, it is hereby ORDERED that all of Petitioners' claims are DISMISSED with prejudice.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

In accordance with 20 U.S.C. § 1415(f), the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." In accordance with 20 U.S.C. § 1415(g), "if the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in the hearing may appeal such findings and decision to the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i).

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices."

Inquiries regarding further notices and time lines should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

This the 29th day of June, 2012.

The Honorable Selina M. Brooks
Administrative Law Judge